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In The

Supreme Court of the United States

October Term, 1975

No. 75-36

ARTHUR T. DAVIDSON, M. D.

Petitioner

-against-

JAMES KIRBY, GEORGE LEONE, WILLIAM STEIBEL and WILLIAM J. DUNN

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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INDEX

	Page
I. PETITION FOR WRIT OF CERTIORARI.....	1
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved.....	2
Statement of the Case	3
Reasons for Granting the Writ.....	6
1. The Ruling That Provisional Employees Have No "Property Interest" In Continuance of Employment Is an Unfair Burden on the Majority of United States Job Holders.....	6
2. The Provisional Classification Is Used as a Means of Practicing Racial and Other Minority Group Discrimination	10
Conclusion	13
APPENDIX	
Memorandum and Order of June 19, 1974.	1a
Judgment of April 3, 1975.....	7a

TABLE OF CASES

Meyer v. Nebraska, 262 U.S. 390, 399 (1923)	7
Perry v. Sindermann, 408 U.S. 593, 92 Supreme Court 2694 (1972)	8

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1975, (p. 6A, infra). Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1), petitioner having asserted below and claiming here, denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether there is a "property interest" in the continuance of provisional employment that is protected by the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was appointed to the position of Medical Director, Medical Assistance Program, Suffolk County, State of New York, on May 28, 1973, by John Kirby, Commissioner of Social Services, Suffolk County, State of New York.

Petitioner faithfully, full, and in a highly satisfactory manner for a period of approximately seven months performed all of the duties associated with this position and was highly commended, and praised by his immediate supervisor, William Stiebel.

Petitioner is an eminently qualified physician who was licensed to practice medicine in the State of New York in September 1948; is a Board Certified General Surgeon; and Assistant Clinical Professor of Surgery at the Albert Einstein College of Medicine, New York, New York, a Cancer Research Scientist with cancer

research laboratories at Maimonides Medical Center, Brooklyn, New York, and the Methodist Hospital, Brooklyn, New York, and a June, 1974, graduate of St. John's University School of Law.

The Civil Service laws of the State of New York Section 65, sub-paragraph 2 requires that a civil service examination for this position be given within one month after an appointment to this position. (McKinney's New York State Laws - Civil Service Law Section 65). This requirement of the Civil Service Law was not complied with.

In a letter dated October 24, 1973, and signed by William J. Dunne, Petitioner was notified that he was "hereby suspended from the position of Medical Director of the Medical Assistance Program effective this date. Charges will follow by Registered Mail."

In a letter dated October 30, 1973, and signed by William J. Dunne, Petitioner was

notified that he was terminated effective that date from the position of Medical Director of the Medical Assistance Program, Suffolk County, State of New York.

Petitioner was: (1) never informed of the charges against him, nor (2) was he afforded an opportunity to respond to these charges.

Petitioner alleges that: (1) the failure to inform him of the nature of the charges against him, and; (2) to afford him an opportunity to respond, is a violation of his civil rights as guaranteed by the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

The District Court and the Court of Appeals for the Second Circuit held that there is no property interest in the continuance of provisional employment.

REASONS FOR GRANTING THE WRIT

This case involves substantial questions affecting important constitutional rights of a large majority of the citizens of the United States who work for a living. Additionally, of great importance, is the fact that in actual practice blatant, overt job discrimination, based on race and minority status, results in that persons in these classes are systematically classified as provisionals, thereby excluding them from the protection of the Fourteenth Amendment of the United States Constitution.

1.

THE RULING THAT PROVISIONAL EMPLOYEES HAVE NO "PROPERTY INTEREST" IN CONTINUANCE OF EMPLOYMENT IS AN UNFAIR BURDEN ON THE MAJORITY OF UNITED STATES JOB HOLDERS.

It is true that this Court in Russell v. Hodges, 470 F. 2d 212, (1972) held that provisional employees have no "property interest"

in continued employment. However, Mr. Justice Marshall in his dissent in Board of Regents v. Roth was of the opinion that, "a public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely or whenever the State deprives him of a property interest, I would go further than the Court does in defining the terms 'liberty' and 'property'. He pointed out that the United States Supreme Court has long maintained that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure." Truax v. Raich, 239 U.S. 33, 41 (1915) (Hughes, J.). See also Meyer v. Nebraska, 262 U. S. 390, 399 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does

not mean that as the result of action by the government he may be "discharged at any time for any reason or for no reason." Truax v. Raich.

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty--liberty to work--which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment."

In Perry v. Sindermann the Court referring to Roth stated "that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules

or understanding." A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

We are asking the Court to expand its definition of a "property interest" that falls within the protection of the "due process" clause of the Fourteenth Amendment.

3.

THE PROVISIONAL CLASSIFICATION IS USED AS A MEANS OF PRACTICING RACIAL AND OTHER MINORITY GROUP DISCRIMINATION.

The syndrome of "last to be hired and first to be fired" affects more than 90% of Black employees. It affects an equally large number of other minority groups and women.

The legal underpinning for this vicious, blatant, reprehensible racial and minority status discrimination is provided by past Court Rulings that there is no property interest in the continuance of provisional employment.

Every study by numerous investigators has revealed the same pattern of overt statistical pattern of employment discrimination against minorities and women in every type of business firm, industrial corporation, financial institution, construction company and even the Federal Government contractors.

More than 1/3 of the non-white population, according to statistics of the U.S. Bureau of

the Census compiled in 1971 were below the officially designated poverty level in 1970. This compares to 1/10 of the white population. Additionally, the Black median family income was less than 2/3 of the White.

Less than 1/5 of Whites were in the poorly-paid unskilled jobs at the lower end of the employment spectrum, however, nearly half of the Blacks were so employed. More depressing was the fact that well over half of the employed Whites held white-collar jobs compared to under 1/20 for Blacks.[1]

A study by the Equal Employment Opportunity Commission of "White Collar Employment in 100 Major New York City Corporations" in 1968 showed how poorly represented minorities were at the management and lower management grades even in

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[1] SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES, 1971, U. S. Bureau of the Census, Current Population Reports, Series P-23, No. 42. Washington, D.C.: U. S. Government Printing Office, 1972.

companies with comparatively good reputations for minority hiring.

Significantly, the EEOC found that this pattern of underutilization of minorities in white-collar jobs is general and also includes females.[2]

[2] JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY, U. S. Equal Employment Opportunity Commission, Office of Research, Washington, D.C.

CONCLUSIONS

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR T. DAVIDSON, M. D. pro se
16 Montgomery Place
New Rochelle, New York 10804

Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

In the Matter of the Application

of

74-C-331

ARTHUR T. DAVIDSON, M. D. etc.,

June 19, 1974

Plaintiff,

-against-

JAMES KIRBY, Commissioner of Social Services, Suffolk County, State of New York, et al.,

Defendants.

----------x

Appearances:

ARTHUR T. DAVIDSON, M. D.
Plaintiff, pro se

HON. GEORGE A. PERCY, JR.
Suffolk County Attorney
Attorney for Respondents

By: STANLEY S. CORWIN, ESQ.
Of Counsel

JUDD, J.

MEMORANDUM AND ORDER

Defendants have moved to dismiss this civil

rights action for lack of jurisdiction in various aspects, or to stay the action pending the determination of a proceeding in the state court.

Plaintiff seeks to review his dismissal from a provisional post as Medical Director of the Medical Assistance Program of the Suffolk County Department of Social Services.

Facts

Plaintiff was appointed as a provisional employee in a competitive class position on May 28, 1973 at a salary of approximately $31,000. Although the New York Civil Service Law (Section 65) requires that provisional appointees to positions in the competitive class take a civil service examination within one month after their appointment, the State Civil Service Commission had not promulgated any examination up to October 24, 1973, on which date plaintiff was dismissed by the Director of

Administrative Services of the Department of Social Services.

Plaintiff is black, and asserts that there are few blacks in supervisory or line positions in the Suffolk County Department of Social Services, which defendants deny. Plaintiff does not allege any facts indicating that his dismissal racially inspired.

Plaintiff asserts that he was arbitrarily dismissed for being two hours late on one day when his automobile broke down and that his record of attendance had been perfect for four months, apart from three days personal leave. Defendants assert that plaintiff had a poor attendance record and was not giving full time to his job, that he was still going to law school, teaching medicine, carrying on an active medical and surgery practice in Brooklyn (which plaintiff says he gave up in order to take the Suffolk County job), and living in Westchester.

They assert that he "was not producing" as required for the Suffolk County job.

Plaintiff began an Article 78 proceeding in the Suffolk County Supreme Court on October 17, 1973 to prohibit his contemplated dismissal. An order to show cause was obtained, with a stay which expired on October 24, 1973.

The Suffolk County proceeding was dismissed by Mr. Justice Underwood on December 19, 1973. The primary ground of dismissal was that the petition was not served on any of the necessary parties under NYCPLR Sec. 311 (4). Alternatively, the court stated that the petition was subject to dismissal because a provisional employee does not obtain civil service status and is not entitled to retain his position upon being discharged.

Dicussion

Much of plaintiff's memorandum is devoted to state law questions as to his procedural rights. Under federal law, the right to remain in a provisional post is similar to a teacher's right to achieve tenure, which is actionable in a federal court only if there is (1) denial of First Amendment rights, (2) infringement of a property interest under the Fourteenth Amendment, or (3) deprivation of liberty under the Fourteenth Amendment. Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694 (1972); Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972).

There is no showing of any violation of plaintiff's First Amendment rights.

There is no property interest in the continuance of a provisional employment. Simard v. Board of Education, 473 F.2d 988 (2d Cir. 1973).

There is no showing of any injury to

plaintiff's reputation or his ability to obtain future employment. Canty v. Board of Education, 470 F.2d 1111 (2d Cir. 1972), cert. denied, 412 U.S. 907, 93 S. Ct. 2301 (1973); Russell v. Hodges, 470 F. 2d 212 (2d Cir. 1972).

Since no personal jurisdiction of necessary parties was obtained in the state court action, its pendency would not justify federal abstention, even though plaintiff has appealed to the Appellate Division. In any event, the lack of merits in this action makes it unnecessary to consider whether to defer to the state court.

It is ORDERED that the defendants' motion be granted, and that the action be dismissed for failure to state a claim upon which this court may grant relief, but with leave to amend the complaint within thirty days.

/s/ ORRIN G. JUDD

U. S. D. J.

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of April one thousand nine hundred and seventy-five.

Present:

HON. ROBERT P. ANDERSON

HON. WALTER R. MANSFIELD

HON. JAMES L. OAKES

Circuit Judges,

74-2019

In the matter of the application of Arthur T. Davidson, M.D. for an order prohibiting respondents from terminating petitioner's employment as medical director of the Medical Assistance Program, County of Suffolk, State of New York, prior to notifying petitioner of the nature of the charges against him and affording him the opportunity to respond.

Arthur T. Davidson, M. D.,

Plaintiff-Appellant,

v.

James Kirby, Commissioner of Social Services, Suffolk County, State of New York, George Leone, Commissioner of Health, Suffolk County, Stateof New York, William Stiebel, Medical Assistance Administrator, Suffolk County, State of New York, William J. Dunn, Director of Administrative, Suffolk County, State of New York,

Defendants-Appelles

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed. Rejection of appellant's due process claim is required by the Supreme Court's decision in Board of Regents v. Roth 408 U.S. 564 (1972) and his equal protection argument was considered and rejected by us in Rusell v. Hodges 470 F2 212 (2 Cir. 1972). Each side is to bear its own costs.

/s/
HON. ROBERT P. ANDERSON

/s/
HON. WALTER R. MANSFIELD

/s/
HON. JAMES L. OAKES
Circuit Judges

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Date: October 17, 1975

TABLE OF CONTENTS

	PAGE
Question Presented	1
Statement of the Case	1
Argument	4
POINT I—The decision below was clearly correct	5
Conclusion	6

CITATIONS

Board of Regents v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701 p. 4, 5 (1972)	5
Goss v. *Lopez*, —— U.S. ——, 95 S.Ct. 729 (1975)	6
Perry v. *Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972)	5
Russell v. *Hodges*, 470 F 2d 212 (1972)	5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Question Presented

Was petitioner, a probationary employee terminated without charges, stigmatized, deprived of his liberty or a property interest such that due process requires reinstatement, or even a hearing.

Statement of the Case

A medical assistance administration was set up as an agency of Suffolk County (New York). A position of Medical Director, jurisdictionally classified competitive, was established and on May 29, 1973, petitioner was appointed provisionally. His duty was to examine physicians' claims for services under a medicare program.

He resided in Westchester County, maintained a medical office in Brooklyn, was attending law school and devoting time to many professional interests and societies. Over 1,000 medicare claims piled up on his desk despite repeated admonition to get on the job, and on October 12, 1973, his supervisor suspended him.

On October 17, 1973, petitioner obtained a show cause order in the Supreme Court (New York), Suffolk County, containing a stay against his termination. On the adjourned return of the motion the restraint was not continued and petitioner was terminated on October 30, 1973. His Article 78 proceeding against several Suffolk County officers was denied and a judgment to that effect was entered January 8, 1974. Petitioner appealed to the Appellate Division, Second Department, but has not perfected the appeal.

On March 19, 1974, service of the summons and complaint in this action was made, and the county officer respondents moved to dismiss. The District Court granted their motion.

The proceeding in the state court was based on civil service law. There petitioner asserted he was not a provisional employee, the county officers failed to conduct an examination to create an eligible list and generally acted capriciously and arbitrarily, and abused their discretion.

Although the state court dismissed the petition on a technicality, it observed that the petition was so lacking in merit that had proper service have been made, the court would have been obliged to dismiss on the law, since in New York a provisional appointment does not ripen into a competitive one.

While an appeal in that case was still pending petitioner commenced this action, asserting jurisdiction under 28 U.S.C. Sect. 1343 and 42 U.S.C. Sect. 1983. The thrust of his complaint was merely that he was never charged

nor afforded an opportunity to reply and that respondents' failure to inform him of the nature of the charges and afford petitioner an opportunity to respond violated his civil rights to due process.

The complaint states petitioner was appointed as Medical Director of the Suffolk County Medical Assistance Program.

He avers he faithfully, fully, and in a highly satisfactory manner performed all the duties of the position.

At the same time he professed himself to be a board-certified general surgeon and assistant clinical professor of surgery at one institution, a cancer research scientist with laboratories at two other institutions, and a fourth year law student.

He claims he was suspended October 24, 1973, by a letter which indicated charges would follow, and terminated from the position six days later.

His grievance is he was never informed of the charges nor given an opportunity to reply and was thereby denied his civil rights as guaranteed by the due process clause of the Fourteenth Amendment.

Before the District Court on the motion to dismiss were facts needed to fill in the obvious voids in the complaint.

The first essential fact is that petitioner was hired as a provisional. He never had permanent civil service status and was subject to immediate discharge.

The second essential fact is that the petitioner, knowing his discharge was imminent, instituted an Article 78 proceeding and obtained an ex parte order enjoining his termination.

It was at the inception of the New York proceeding by order to show cause that the problem of charges arose.

When the respondent Kirby understood that petitioner was not prepared to explain what brought about the office

conditions that existed, and to say that he was prepared to give the needed full time attention the job required, but was, instead, attempting to use the courts to hang on to the job, he would have forthwith fired petitioner but was prevented from doing so because of the temporary restraining order.

Under the circumstances he took advantage of an option available to him; he suspended petitioner effective October 24, 1973. At the same time he terminated petitioner, but specifically made the termination subject to the show cause order.

As it happened, on the adjourned return date of the show cause order the stay was not continued. There was then no necessity to proceed with charges to support the suspension.

On October 30, 1973, petitioner was informed by letter that inasmuch as the stay was not continued his termination was effective as of the close of business on that day and that under the circumstances the suspension of October 24 was withdrawn as academic.

The District Court (EDNY), Judd, J., dismissed the complaint by an order dated June 19, 1974; the Court of Appeals for the Second Circuit affirmed by its order dated April 3, 1975.

Argument

The issue here is narrow. The decisions of the courts below were squarely within the boundaries that have just recently been defined concerning the applicability of the due process clause to public employee dismissals.

POINT I

The decision below was clearly correct.

By his order in the District Court, Judge Judd afforded the petitioner leave to amend his complaint. He declined, and on appeal to the Second Circuit Court of Appeals claimed his dismissal was racially inspired. In his memorandum Judge Judd had specifically noted "Plaintiff does not allege any facts indicating that his dismissal was racially inspired", and the Circuit Court succinctly noted that the "equal protection argument was considered and rejected by [it] in *Russell* v. *Hodges*, 470 F. 2d 212 (2 Cir. 1972)."

Petitioner does not raise the stigma question. Certainly he cannot claim his termination had the effect of depriving him of other employment. It was his "other employment" to an overburdening degree that resulted in his virtual abandonment of his public job and consequent dismissal.

Petitioner dispatches this Court's teaching in *Perry* v. *Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972) and *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972) by asserting the ultra-extreme view that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying employment" (petitioner's brief, p. 9), and asking the Court to expand its definition of a "property interest" accordingly.

That assertion is more of an exercise of the right of free speech than a pronouncement of an established or desirable legal principle.

In *Board of Regents* v. *Roth, supra,* this Court said "it stretches the concept too far to suggest that a person is deprived of a 'liberty' when he simply is not re-hired in one job but remains as free as before to seek another."

The recent refinement in *Goss* v. *Lopez,* —— U.S. ——, 95 S. Ct. 729 (1975), extending the "property" concept to school suspension does not embrace the theory advanced by the petitioner here.

There is no conflict of decision and no important question of federal law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Suffolk County Attorney
Attorney for Respondents

STANLEY S. CORWIN,
of Counsel